United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by
Michael R. Wolford

76-1346

In The

United States Court of Appeals

For the Second Circuit

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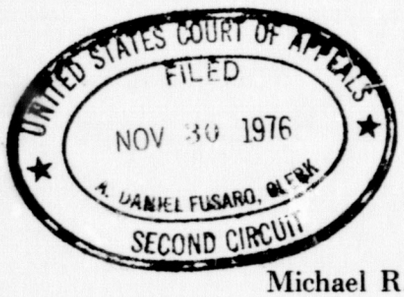
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WALTER R. CONLIN,
Defendant-Appellant.

Appeal from a Judgment of Conviction in the
United States District Court for the
Western District of New York at 74-265

BRIEF FOR THE DEFENDANT-APPELLANT



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STATEMENT OF THE CASE

The defendant Walter R. Conlin was charged in a fifteen count indictment by the Federal Grand Jury of the Western District of New York on October 10, 1974. The

defendant was charged with thirteen counts in violation of Title 26, United States Code, Section 7206(2) (preparing false and fraudulent Federal Income Tax returns for the years 1972 and 1973); one count in violation of Title 18, United States Code, Section 2071(a) (destroying government records in the possession of the Small Business Administration); and one count in violation of Title 18, United States Code, Section 1001 (submitting a false loan application to the Small Business Administration).

The defendant was arraigned with counsel on October 29, 1974 and entered a plea of not guilty. On December 4, 1974, the defendant filed a motion for discovery and inspection and the motion was heard before U.S. District Court Judge Harold P. Burke on January 13, 1975. The only contested portion of the motion dealt with the defendant's request for discovery and inspection as contained in paragraphs 2, 3 and 4 of his motion papers. In a decision dated June 11, 1975, Judge Burke summarily denied defendant's requests.

The jury trial of this matter commenced on March 24, 1976 and concluded on April 8, 1976. The jury returned a verdict of guilty on ten of the fifteen counts charged in the indictment and the defendant was found not guilty on the remaining five counts. Specifically, the

defendant was found guilty on counts 1, 4, 5, 8, 9, 11, 12 and 13 which charged him with violations of Title 26, United States Code, Section 7206(2). The defendant was also found guilty on count 14 which charged him with a violation of Title 18, United States Code, Section 2071(a) and on count 15 which charged him with the violation of Title 18, United States Code, Section 1001.

The defendant was sentenced by the Honorable Harold P. Burke on May 10, 1976 to concurrent terms of two years each on the counts upon which he was found guilty. The Court suspended the execution of the sentence and placed the defendant on probation for a period of two years and imposed a fine of $1,000 on each of the counts numbered 1, 4, 5, 8 and 15.

The defendant filed a notice of appeal on May 18, 1976 from the judgment of conviction.

ISSUES PRESENTED

1. Whether the evidence presented at trial was sufficient to sustain the conviction of assisting in the preparation of false and fraudulent tax returns.

2. Whether the admission in evidence of the testimony of Revenue Agent Matyjakowski and his summary exhibit constituted reversible error.

3. Whether the admission in evidence of the defendant's silence when interviewed by FBI Agents caused a reversible error to occur.

4. Whether the content of the Court's instructions to the jury and its failure to comply with Rule 30 of the Federal Rules of Criminal Procedure require a reversal of the conviction.

5. Whether the evidence presented on count 15 was sufficient to sustain the conviction.

6. Whether the numerous errors that occurred before and during the trial deprived the defendant of a fair trial.

FACTS

The defendant, Walter R. Conlin, a public accountant, operated the Southern Tier Accounting and Tax Bureau in Corning, New York since 1952 (1094).* During the pertinent years in question, (1972-1974) the defendant had in his employ an office manager, Mrs. Evelyn Beach (890), and Miss Kathryn Peterson, a secretary (935). Mr. Conlin's major activity dealt with the preparation of individual income tax

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* ( ) refers to pages of the trial transcript contained in the record on appeal.

returns and the rendition of this service required him to work seven days a week, in excess of twelve hours a day (984-985).

HURRICANE AGNES AND ITS AFTERMATH

On June 23, 1972, Hurricane Agnes struck the Corning-Elmira, New York area. As a result, the homes in the vicinity were beseiged by floodwaters and people were required to evacuate from the area. Furthermore, the flood resulted in the destruction of personal and real property, including personal records of the residents (898). In fact, the defendant was unable to live in his home until September 28, 1972; and during that period he camped with his family on the front lawn of a relative (1009-1010).

In addition to his tax service, Mr. Conlin assisted various clients in preparing loan applications to the Small Business Administration for flood-related casualty losses. The defendant's work load increased substantially during the year 1972 and his office assisted in the preparation of 1,392 tax returns (892). This increased volume was the result of the departure from the area of other public accountants (900). In addition to his staff personnel, Mr. Conlin's family, including his wife and sons, also assisted in the operation of his office during this period. (898-899)

METHOD OF PREPARATION

Since many of Mr. Conlin's clients had their tax returns prepared by him and his staff on a regular basis, the individual interview with the client would include a reference to the previous year's return (1007-1008). His average interview with the taxpayer would be approximately 45 minutes in length, however, many were of greater duration (895). After the information was obtained, it would be placed in a file and given to Mrs. Beach who would arrange to have the return prepared (892). Mrs. Beach would prepare the current return based upon the previous year's information coupled with the additional information that was obtained from the client during the interview or through subsequent telephone conversations (891-892).

TRIAL

a. The Preparation of Allegedly False and Fraudulent Income Tax Returns

With respect to the counts in the indictment which charged the defendant with the preparation of fraudulent tax returns, the government simply introduced the tax returns filed with the Internal Revenue Service and the testimony of only one of the joint taxpayers on each of the returns with

the exception of Mrs. Wenderlich who was an individual taxpayer. In essence, the testimony presented by the government consisted of each taxpayer stating that the information on the return with respect to certain deductions was inaccurate. The taxpayers also testified that in certain instances the deductions in question were in amounts greater than the figures conveyed to Mr. Conlin at the time of their individual interviews.

The government also presented a revenue agent who prepared a schedule (G-68)* which summarized the deductions taken on the subject tax returns. The agent compared the deductions with the amounts that he would allow if he were conducting a civil audit of the returns (849). This exhibit (G-68) and the testimony was introduced in evidence over the defendant's objection (777).

In response to the government's proof, the defendant testified on his own behalf and identified the various worksheets and office copies of the tax returns which supported the deductions. In addition, he testified that the information on the returns was conveyed to him by the various taxpayers, some of whom were not presented by the government.

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* G - refers to government exhibits and D - refers to defendant's exhibits.

b. The Alleged Destruction of Government Records at the SBA Office

On January 18, 1974, the defendant accompanied Mr. Thomas Gill to the office of the Small Business Administration in Elmira, New York (989). According to the defendant, he brought with him, to the SBA, copies of Mr. Gill's tax returns for years 1970 and 1971 which had been requested in connection with the SBA's reconsideration of Mr. Gill's loan application (987-988). When the defendant and Gill arrived at the office, they met with Mr. Cristofaro, of the SBA, and he requested both Conlin and Gill to sign the two returns (54). After the returns were signed, Mr. Cristofaro handed a letter dated January 18, 1974 (D-2)* to Mr. Gill and Mr. Conlin (56). In essence, the letter indicated that the SBA desired additional information before it would decide whether the application for reconsideration would be accepted.

In response to this statement, Mr. Conlin placed the two tax returns that he had brought to the office that morning in his briefcase (994-996). Mr. Cristofaro demanded that the returns be given to him unless a letter of withdrawal was submitted (58). In response, Mr. Conlin wrote on a piece of paper "I hereby withdraw the application" and Mr. Gill signed it and gave it to Mr. Cristofaro (53).

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* This Exhibit appears at p. 30 of Defendant's Appendix.

Despite the note being submitted to Mr. Cristofaro, he still demanded that the returns be left with him and when Mr. Conlin refused, the FBI were called to the scene (68). While the FBI were en route, Mr. Conlin tore up the two returns and placed the remnants in his briefcase and pockets. When the FBI agents arrived at the office, Mr. Conlin was placed under arrest for allegedly destroying government records.

ARGUMENT

POINT I

THE EVIDENCE ADDUCED AT THE TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF ASSISTING IN THE PREPARATION OF FALSE AND FRAUDULENT TAX RETURNS

The defendant, Walter Conlin, was convicted on eight counts in the indictment of violating Title 26, United States Code, Section 7206(2). These counts involved the preparation of six joint tax returns for the year 1972 and two tax returns of Mrs. Wenderlich for the years 1972 and 1973. Although it is the defendant's primary contention that the proof with respect to "willfulness" was totally lacking, it is first appropriate to analyze the proof as to each of the counts, with respect to the claim that the deductions taken on the returns were known by the defendant to be false.

COUNT 1 - Mary and Charles Ryder

In the indictment, it is alleged that four separate deductions taken on the Ryder tax return were incorrect. These deductions dealt with the following: casualty loss; gasoline taxes; sales taxes; and child care expenses. In essence, the indictment alleges that although the taxpayers incurred deductions in the above categories, the amounts claimed were larger than the amounts allowed.

Although both Charles and Mary Ryder signed the return that was filed (G-33), only Mrs. Ryder testified at the time of trial (649-679). In essence, Mrs. Ryder testified that she advised the defendant that she and her husband had a mileage figure of 28,000 in 1972 (652), incurred child care expenses of $880 (654) and sustained personal property damage as a result of the flood in the amount of $1,532.61 (656). She also testified that she did not tell Mr. Conlin that she had paid sales taxes of $141 on building materials (653). Although Mrs. Ryder identified the worksheet (G-60,* 651) which was submitted to Mr. Conlin, it appears from this exhibit that there was no amount listed for mileage, or gasoline tax, but rather there existed simply a question mark which was also listed next to the category "flood damage". The exhibit also reflects notations regarding

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* This Exhibit appears at p. 25 of Defendant's Appendix.

sales tax being incurred on various purchases which do not appear on the tax return. Mrs. Ryder also testified that she and her husband actually had three vehicles at their disposal that used gas in 1972 but she only mentioned two of them to Mr. Conlin (665).

According to the testimony of the defendant, who identified Exhibit D-9A (1015) as being his office copy and worksheet for the Ryder return, he calculated the deductions taken on the Ryder return from the interview with Mrs. Ryder (1015-1018). His calculation of the mileage was based upon Mrs. Ryder's statement to him that they had incurred 22,000, 18,000 and 7,000 miles on their three vehicles (1016). In addition, the sales tax computation of $141 was based upon the tax incurred on the purchase of new furniture in the amount of $50 which appears on Exhibit G-60, coupled with the tax incurred on the purchases made with the proceeds of the SBA loan in the amount of $1,300, which is also reflected on the worksheet of Mrs. Ryder (1017). The casualty loss deduction of $3,200 was based upon Mrs. Ryder's statement to Mr. Conlin that they had sustained damage to personal property of approximately $4,800 (1015-16). The child care expense, which was approximately $300 greater than the amount Mrs. Ryder claims was incurred by them, was apparently a miscalculation of the number of months that the child care expense was incurred (1180-1183).

In essence, the testimony submitted on this count, taken as a whole, was not contradictory and there was sufficient support from the government's own exhibit (G-60) to verify the testimony of the defendant.

COUNT 4 - Lewis and Estella Ross

In the indictment, it is alleged that the 1972 tax return of Lewis and Estella Ross contained false deductions with respect to medical expenses, interest expense and casualty loss.

In support of this charge, the government presented the testimony of only Mrs. Ross, although both taxpayers signed the return and only Mr. Ross had income during the year 1972.

Mrs. Ross advised that the medical deductions taken in 1972 were incorrect since these amounts were actually incurred and taken as deductions in 1971 as appears from the 1971 tax return (G-17) (233-234). In addition, she advised that the interest expense for installment purchases in the amount of $94.12 was inaccurate since she did not have any charge accounts (240). Furthermore, she testified that although she had a sizeable casualty loss resulting from the flood, the amount listed on the return was not told to Mr. Conlin by her (242).

In response, the defendant testified that when he interviewed Mrs. Ross, he had the 1971 tax return in front of him and he went through the various figures on it to determine what expenses were incurred by the taxpayers in 1972 (1034-1035). According to his worksheet, which contains his notes of the interview, the amounts that appear on the tax return were given to him by Mrs. Ross, including the medical expenses and the interest expense of $94.12. In addition, she submitted to him a list of the personal property that was lost in the flood. She also described in some detail the extent of the real property damage that was sustained to them as a result of 4-1/2 feet of water being in the cellar (1036-1037).

COUNT 5 - Paul and Vicki Carozzoni

In the indictment it is charged that the tax return of Mr. and Mrs. Carozzoni for the year 1972 contained false deductions with respect to the union fee and casualty loss amounts and furthermore, there was a failure to include rental income amounting to $1,140.

In support of this allegation, the government presented the testimony of only Paul Carozzoni although both he and his wife signed the return and both were interviewed by Conlin in connection with the preparation of it (1037).

According to Mr. Carozzoni, he did not advise Mr. Conlin that he had rental income that was allegedly unreported (534, 550). Furthermore, he was asked by Mr. Conlin regarding union dues and he told him that he would check on it and let him know (536). He also testified that he sustained damage to his home and an appraisal was made on his property which was attached to his tax return (G-51). The appraisal reflects the drop in value of $3,000, which was the amount of the casualty loss taken.

Based upon the testimony of the government's own witness, there was simply no evidence to sustain the conviction on this count.

COUNT 8 - Jane and Arthur Lamb

In the indictment it was alleged that the 1972 return of Mr. and Mrs. Lamb was incorrect with respect to deductions dealing with medical expenses; gasoline taxes; interest expense; contributions; and miscellaneous deductions.

The sole witness presented by the government in support of this count was Jane Lamb who testified that she was never interviewed by Mr. Conlin but rather she simply submitted a worksheet to Mr. Conlin's secretary (G-25, 336). Mrs. Lamb testified that she signed the return after it was

completed, but again she did not speak to Conlin with respect to the information on it (337). The worksheet (G-25) was therefore used by the government as its sole support for the allegations contained in the indictment. This was done despite the fact that Mr. Conlin testified that he met with Mr. Lamb who worked in the pharmacy below Mr. Conlin's office on more than one occasion to review the various deductions taken on the return (1048-1052). According to Mr. Conlin, Mr. Lamb supplied him with additional information that did not appear on the worksheet (G-25) and this information was inserted on the return (1206-1218).

It was conceded by the government when it attempted to offer an affidavit of Arthur Lamb, that his absence would "leave a tremendous gap in the proof" (1314). Furthermore, the government admitted "there was no direct face-to-face confrontation with the taxpayer with Mr. Conlin" (1315). Despite the obvious inadequacies in the government's proof on this count, the Court improperly allowed it to be submitted to the jury.

COUNT 9 - Herman and Judith A. Clark

In the indictment, it is alleged that the 1972 return of Mr. and Mrs. Clark contained false deductions with respect to medical expense, interest expense, miscellaneous

deductions relating to dues, tax preparation expense and business expense. In essence, the indictment charged that there were deductions of $466.90 which were improperly claimed on the return.

In support of this count, the government presented the testimony of only Mr. Herman Clark, although both he and his wife, Judith, signed the return (G-31).

Mr. Clark testified that he had an interview with Mr. Conlin approximately one week before the return was filed. He brought with him the summary sheet (G-52) which he submitted to Mr. Conlin (559). According to Mr. Clark, the amounts that appear on the tax return, with respect to the deductions in question were incorrect, and his summary sheet contained the correct deductions (560).

Mr. Conlin testified in response that the deductions taken on the return were based upon information supplied to him by Mr. Clark and his work sheets (D-19) support the deductions taken on the return (1052-1056). According to Mr. Conlin, he referred to the 1971 tax return of Mr. Clark (G-53) during the interview as a reference for the deductions taken in 1972 (1053).

In comparing the 1971 return to the deductions in question, it appears that installment purchases, interest to the Chemung Canal Trust Company Bank, union dues and the

business expense for the flashing car light are identical. In addition, according to Mr. Conlin, the medical expense listed on the summary sheet (G-52) contained no breakdown and during the interview Mr. Clark telephoned his wife for additional information which was then conveyed to Mr. Conlin for purposes of preparing the return (1053-1054). When the interview was completed and the information compiled, Mr. Conlin turned over the material to Mrs. Beach who prepared the totals and completed the return (1054).

With respect to the tax preparation expense, Mr. Conlin testified that the amount deducted, namely $114, represented Mr. Clark's payment to him in 1972 of his charges for both 1971 and 1970 (1055-1056).

COUNT 11 - Gary and Carol Warner, Sr.

In the indictment it is alleged that the tax return of Mr. and Mrs. Warner for the year 1972 contained false deductions with respect to medical expense, real estate taxes, gasoline taxes, interest expense and casualty loss.

In support of this count, the government again presented the testimony of only Mr. Warner (508-527) even though both Mr. and Mrs. Warner signed the tax return (G-32) and both attended the interview with Mr. Conlin (519).

According to Mr. Warner, the deductions in question on the 1972 return were incorrect and he did not submit to Mr. Conlin the claimed amounts.

In response, Mr. Conlin testified and identified his work sheets (D-21, 1061) which contained his notes of the interview with Mr. Warner. Mr. Conlin testified that the amounts taken on the 1972 return were conveyed to him by Mr. Warner during the interview (1061-1064). In reviewing Exhibit (D-21), it appears that the handwritten notes of the interview support the deductions claimed on the return.

COUNT 12 - Richardean Wenderlich 1972

In the indictment, it is alleged that the deductions claimed on the 1972 tax return of Mrs. Wenderlich were incorrect with respect to the casualty loss claim and the depreciation schedule.

In support of the allegations made in this count, the government presented the testimony of Mrs. Wenderlich (680-765). Mrs. Wenderlich, who operated a florist shop, testified that she met with Mr. Conlin to prepare her 1972 tax return (G-37). At that time, she brought with her the 1971 tax return (G-61) which had been prepared by H&R Block. According to Mrs. Wenderlich, the depreciation claimed on the 1972 return was calculated by Mr. Conlin from the information contained in the depreciation schedule attached to

the 1971 tax return (690). Although she claimed that the casualty loss of $9,500 was not an amount she submitted to Mr. Conlin, she did identify Exhibit 66 (719) as being an appraisal of her property which supported a decline in value of $12,000.

COUNT 13 - Richardean Wenderlich (1973)

In the indictment, it is alleged that the gross receipts contained on the 1973 return are understated as well as the interest income amount.

In support of this count, the government presented the testimony of Mrs. Wenderlich, who advised that the books of her florist shop for 1973 (G-64) reflect gross receipts totalling approximately $54,000 as compared to the $46,000 amount claimed on the return (708). In addition, Mrs. Wenderlich advised that she submitted to Mr. Conlin in connection with the preparation of her 1973 return, interest income receipts totalling $1,214.41, whereas the tax return reflected interest income of $880.15 (709-710). She did admit, however, that she may not have given all the interest payment forms to Mr. Conlin at the time he prepared her 1973 return (748).

In response, Mr. Conlin testified that he prepared a schedule (D-24) containing the taxpayer's gross receipts

for the year 1973 (1078). According to the defendant, he simply made a mistake in calculating the gross receipts total in that he inserted a (1) rather than a (2) in determining her cash sales for the period in question (1080). In addition, he advised that he added the interest income in Mrs. Wenderlich's presence and it totaled $880.15 (1081-1082). He also reviewed the return with her at the time she signed it.

Absence of Willfulness

The evidence presented by the government failed to reflect any proof of "willfulness" on the part of the defendant. Although the evidence (when viewed most favorable to the prosecution), would indicate that the information contained on the tax returns was inaccurate in certain instances, there was no proof reflecting a willful preparation of fraudulent tax returns by the defendant. In particular, there was no proof that the defendant advised any of the taxpayers in question that he was increasing their deductions improperly, nor was there any evidence reflecting the preparation of false documentation to support the deductions claimed. Furthermore, the returns in question indicate that the overwhelming majority of the deductions claimed were accurate and those that were allegedly false were often in very minor amounts.

It appears to be established that the element of willfulness required for a conviction of Section 7206(2) necessitates a finding of "bad purpose or evil motive", United States v. Bishop, 412 U.S. 346, 360 (1973) and this element was totally lacking. A search of the record fails to reveal any proof that the defendant exhibited an "evil motive" or "bad purpose" in connection with the preparation of the tax returns in question.

The defendant himself, readily admitted that he and his office staff made errors (1009-1010) and it is apparent that the methodology he used (reference to the previous year's return) probably caused him to make such errors.

Taken at its best, the government's proof revealed errors made by an overworked and understaffed taxpreparer. The proof, however, was considerably less than that required to convict the defendant of willfully preparing fraudulent returns.

POINT II

THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING IN EVIDENCE THE TESTIMONY OF MR. MATYJAKOWSKI AND THE EXHIBIT IDENTIFIED BY HIM

At the conclusion of the government's case, it presented the testimony of Mr. Roger Matyjakowski who was employed by the Internal Revenue Service as a revenue agent engaged in auditing Federal Income tax returns (768). Mr. Matyjakowski identified an exhibit (G-68)* which was prepared under his supervision and which purported to be a comparison between the deductions claimed on the various income tax returns and the proof presented by the government with respect to these deductions (769-771). The exhibit was introduced in evidence over defendant's objection (777) and was distributed to the jury at the time of the witnesses' testimony and while the jury deliberated.

It is apparent that the Court never reviewed the exhibit nor did it ever appreciate the purpose of the testimony until the cross-examination of the witness was concluded. Specifically, the Court was under the misapprehension that the exhibit was merely a summary of the evidence that had been presented by the various government witnesses (772-773). In fact, however, the witness clearly testified that the exhibit contained <u>his evaluation</u> of the testimony and <u>his interpretation</u> of the Internal Revenue Regulations

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* This Exhibit appears on p. 26 of Defendant's Appendix.

with respect to the allowance of certain deductions (848-849).

Although the exhibit purportedly lists a comparison between the amounts claimed on the returns and the "amount per evidence", such a characterization was a gross distortion. The column entitled "amount per evidence" was actually the amounts that the witness concluded would have been allowed in a civil audit (849). Despite this revelation, the Court refused to strike the exhibit and allowed it to be submitted to the jury and used in its deliberations (850-853).

The use of this exhibit resulted in the jury having an indelible impression that the government witnesses had established, through their testimony, the absence of any support for the deductions taken on the returns. The exhibit, however, only reflected Mr. Matyjakowski's interpretation of the Internal Revenue Law and the evidence presented by the government. The Court's failure to review the exhibit and determine its validity before presenting it to the jury, resulted in a substantial error which affected all 13 counts of the indictment dealing with the preparation of the allegedly false and fraudulent tax returns.

The introduction of this exhibit was exactly the type of prejudicial evidence which was condemned by the

court in Steele v. United States, 222 F.2d 628 (5th Cir. 1955) cert. denied, 355 U.S. 828 (1957). The circuit court reversed the conviction for income tax evasion in the Steele case on the grounds that the summary exhibit introduced by the government contained not a summary of the testimony, but rather an attempt by the agent who prepared it, to evaluate the evidence and invade the province of the jury.

The grave responsibility imposed upon trial courts by the holding in the Holland v. United States, 348 U.S. 121 (1954) and its progeny was completely disregarded in the instant matter. The following colloquy, in the jury's presence, which occurred during the cross-examination of the witness, clearly reflects the misapprehension of the court with respect to the purpose of the exhibit:

> THE COURT: Then the way I understand it, your testimony is not designed to assemble the evidence at all?

A. I did not know that was going to be my duty, Your Honor.

> THE COURT: Right now you don't understand that your testimony is supposed to assemble the evidence and put it down in graphic and chart form?

A. I have tried to do it to the best of my ability.

THE COURT: That is not what you tried to do at all. You just told us that you tried to determine from the evidence whether there was a violation of the income tax regulation, that you dealt mainly with the law?

A. Yes, sir.

THE COURT: And not with what the evidence was?

A. You are probably right. I have a gross misunderstanding of what you expected of me.

THE COURT: I didn't expect anything of you. All that I know is that he told me he was going to have an expert witness without knowing what he was going to testify to. I tried to find out what he was going to testify to, and so did Mr. Levy.

THE WITNESS: My apologies, Your Honor. (849-850)

The standard to be applied when a summary chart is

offered in evidence was succinctly stated in Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir. 1971) cert. denied, 404 U.S. 828 (1971) wherein the court stated:

> "When summaries are used, therefore, the Court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury. In addition, the better practice is to require that the primary evidence be available to the opposing party and to afford a reasonable opportunity for comparison in order that the correctness of the summary may be tested on cross-examination. Moreover, and perhaps most important of all, the jury should be instructed that the summaries do not, of themselves, constitute evidence in the case, but only purport to summarize the documented and detailed evidence already admitted; that the jury should examine the basis upon which the summaries rest and be satisfied that they accurately reflect other evidence in this case; and, if not so satisfied, the summaries should be disregarded." (emphasis added)

Furthermore, the exhibit made no reference to the specific items of evidence used by the witness in disallowing certain of the deductions. It also related to deductions that were allegedly incorrect but were not charged in the indictment.

Although the Court did give a brief cautionary instruction regarding the exhibit (1527-1528)* it could hardly be argued that the limited instruction removed the effect that the chart had on the jury's deliberations. This is especially clear in view of the rather complicated and detailed testimony and exhibits presented with respect to

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* The complete charge to the jury appears in Defendant's Appendix beginning at p. 32.

the various deductions. In essence, it was simply left up to the jury to guess as to what evidence in the exhibit was, according to the Court, clearly admissible and what evidence was improper.

It was the Court's responsibility to determine whether the chart contained inadmissible evidence; and if so, the entire exhibit should have been stricken. See Lloyd v. United States, 226 F.2d 9, 17 (5th Cir. 1955).

This egregious error was alone sufficient to contaminate the jury's deliberations and render the conviction subject to reversal.

POINT III

THE PROSECUTOR'S USE, BOTH AS EVIDENCE-IN-CHIEF AND FOR IMPEACHMENT PURPOSES, OF THE DEFENDANT'S ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE WAS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND IT CONSTITUTED REVERSIBLE ERROR.

During the government's direct case, it introduced testimony through two FBI agents, that the defendant, at the time of his arrest on January 18, 1974, remained silent after being advised of his Miranda warnings. This blatant error was further compounded by the prosecution's cross-examination of the defendant with respect to his silence.

It was evident throughout the trial that one of

the major issues on all fifteen counts dealt with the defendant's "credibility" and it was irreparably damaged by the introduction of the above testimony.

In Doyle v. Ohio, __ U.S. __, 49 L. Ed. 2d 91, 96 (June 17, 1976), the petitioners had testified in their state criminal trials and had been cross-examined as to their silence at the time of arrest. The Supreme Court reversed the convictions, holding that impeachment use of a criminal defendant's post-arrest silence violates the Due Process clause of the Fourteenth Amendment. Assurance that silence will carry no penalty, the Court said, is implicit in the Miranda warnings:

> [I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. (49 L. Ed. 2nd at 98.)

The Court, approvingly referred to Mr. Justice White's concurring opinion in United States v. Hale, 422 U.S. 171, 182-183 (1975):

> "...when a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial

> testimony.... Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case. (49 L.Ed 2nd at 98)

The petitioners in Doyle relied upon dictum found in Miranda v. Arizona, 384 U.S. 436, 468 N. 37 (1966):

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

It is noteworthy that the dissenters in Doyle criticized such reliance by noting that this portion of the Miranda decision had its basis in Griffin v. California, 380 U.S. 609 (1965), which, said Mr. Justice Stevens, held only that "the Fifth Amendment, as incorporated in the Fourteenth, prohibited the prosecutor's use of the defendant's silence in its case-in-chief." 49 L. Ed. 2d at 103.

In the instant matter, the prosecution made reference to Mr. Conlin's silence at the time of arrest during both its case-in-chief and the defendant's cross-examination. Initially, upon direct examination of Richard W. Rudy, an agent with the Federal Bureau of Investigation, the prosecution explicitly referred to the statement-of-rights form proffered to Mr. Conlin by Mr. Rudy and to the defendant's subsequent silence:

Q. I show you Government's Exhibit 47 marked for identification, and can you tell me what that is?

A. Yes. This is the statement of rights that I showed to Mr. Conlin, which he read.

Q. And did he sign that?

A. No, he did not, sir.

Q. Did you ask Mr. Conlin to sign that?

A. Yes, I did, sir.

Q. What, if anything, did you say?

MR. LEVY: I object.

THE COURT: Objection is overruled.

A. He declined and said he wanted to talk to his lawyer.

Q. Was he allowed to call his lawyer?

A. Yes, he was.

Q. Did you read what purports to be a statement of his Constitutional rights?

A. No, I did not read it to him, no, sir. He read it himself.

THE COURT: He read it?

A. Yes, sir.

THE COURT: You saw him read it?

A. Yes, sir.

Q. I show you Government's Exhibit 49 marked for

identification. Can you tell me what that is?

A. Yes. This is a log showing the attempted interview with Mr. Conlin by myself.

Q. And did you interview Mr. Conlin?

A. I made an attempt to. I did not because he would not respond to my questions.

Q. And what was the time of the interview, the time that the interview began and the time that it terminated?

A. The interview began at 12:14 P.M., at which time I gave him the statement of his rights. He returned this statement to me at 12:16, at which time he said that he refused to sign it.

Q. Subsequent to the time that Mr. Conlin declined to sign the statement and refused an interview with you, what transpired?

(498-500).

Thereafter, when Robert W. Bucher, another FBI agent, was examined, further reference to Mr. Conlin's silence, as well as to his attempt to seek counsel, was made:

A. I asked Mr. Conlin what was going on, and I asked him where were the papers that he had allegedly taken from the file that we had been told about.

Q. And what did he say to you?

A. He did not answer me.

Q. Did you say anything else to him?

A. Not at that time, no, sir. (585)

* * *

A. No, sir. Mr. Conlin, when he declined to answer me as to when I asked what was he doing, and he should give back any papers that he might have taken, my partner got on the telephone and I stayed with Mr. Conlin. (586)

* * *

Q. Did he say anything to you during the period of time that you were at the Small Business Administration office?

A. I don't recall him saying anything to me.

Q. Did he attempt to call his lawyer?

A. I believe he did make a telephone call for that purpose. I don't think it was completed, as I remember it. (587)

* * *

Q. And at 12:49 he was placed under arrest?

A. Yes, sir.

Q. Did he say anything to you, give any explanations at all during that period of time?

A. No, sir. (588)

And finally, during cross-examination of Mr. Conlin, the subject of his silence at the time of arrest was once agai raised:

Q. Mr. Bucher is mistaken as to that testimony, is that right?

A. What was his testimony?

Q. Don't you recall his testimony, that you didn't say anything to him for an hour and a half after they arrived in the Small Business Administration office?

A. He wanted me to sit at Mr. McDevitt's desk for an interview. The other gentleman went up in Mr. Cristofaro's office. And he told Mr. Garrity about some form he wanted him to get, and I told the gentleman that was interviewing me, I said, "I prefer not to make any statements or sign anything until my attorney is present." With that he got up, went up in the other office to call the U. S. Attorney, and I went back out to the phone, and I continued my conversation with my client's attorney, and that is where I shoved the stuff out of the briefcase into my pocket.

A. And it was just into your pocket?

Q. That is where I intended it to go.

A. And you did not tell Mr. Bucher or Mr. Rudy that you brought those things in until an hour and a half later, is that right?

A. No, sir.

Q. Did you tell him before that?

A. Yes, sir.

Q. When?

A. One of them came back and told me the U. S. Attorney wanted to talk to me on the phone, and they stood right there and heard me tell the U. S. Attorney right on the phone, "What I came in with, I want to go out with."

And he asked to put one of the FBI men back on, and I went back on the phone and continued my conversation with my client's attorney.

Q. Mr. Bucher is mistaken in his testimony that you did not make any statements before an hour and a half?

A. I know he was right there and heard what I said on the phone.

Q. And Mr. Rudy is incorrect when he said that you didn't make any statements concerning those documents?

A. He stood right there and heard what I said on the phone.

Q. I'm asking, are they mistaken?

A. Unless they weren't listening, they have to be mistaken.

Q. And Mr. Garrity was mistaken when he said you didn't say anything to him when he told you that you couldn't remove those documents?

A. Oh, absolutely.

(1286-1288).

Doyle makes clear that the impeachment of Mr. Conlin's testimony by the use of his silence at the time of arrest constituted reversible error. It surely prejudiced the defendant immeasurably, and it was clearly without probative value. Moreover, the prosecutor's use of Mr. Conlin's assertion of his Fifth Amendment privilege as evidence-in-chief was in blatant violation of Miranda's mandate. It violated both the letter and the spirit of the Fifth Amendment. If such evidence is so inflammatory as to be inadmissible for the purpose of impeaching credibility, it certainly cannot be acceptable evidence of guilt.

As the Fifth Circuit explained when charged with reconsidering its decision in United States v. Impson, 531 F.2d 274, 276-77 (5th Cir. 1976) in light of the Supreme

Court's opinion in United States v. Hale, 422 U.S. 171 (1975):

> Government counsel suggests to us that Hale is distinguishable because the fact of his silence at arrest came out during his cross-examination, whereas here the government trial counsel elicited testimony of Impson's silence during the prosecution's case-in-chief. We perceive no logical basis for the proposed distinction. (531 F2d at p. 276)

* * *

If the Government should contend that these errors were in fact harmless, it must meet a heavy burden of proof, for under Chapman v. California, 386 U.S. 18, 24 (1967), "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." See also United States v. Fike, 534 F.2d 731 (7th Cir. 1976); Scarborough v. Arizona, 531 F.2d 959 (9th Cir. 1976).

There is actually little room for doubt that the several references made during the course of this trial to Mr. Conlin's silence at the time of his arrest unduly tainted the proceeding and prejudiced the defendant. They constituted error of constitutional dimension, being violative of a criminal defendant's fundamental privilege against self-incrimination. Such egregious contravention of a protection afforded by the Constitution itself cannot be sanctioned by judicial proceedings, but must instead be held to constitute reversible error.

POINT IV

THE COURT'S FAILURE TO COMPLY WITH RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE DEFECTIVE CHARGE TO THE JURY PREJUDICED THE DEFENDANT AND DEPRIVED HIM OF A FAIR TRIAL

The trial court totally disregarded the requirements of Rule 30 of the Federal Rules of Criminal Procedure dealing with its duty to inform counsel of its proposed charge before the summations and with respect to giving counsel an opportunity to make objection to the court's instructions out of the hearing of the jury.

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on law as set forth in the request. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. (Emphasis Added).

The defendant's counsel submitted to the court

detailed requests to charge on all fifteen counts in the indictment. These requests which number 1 to 27 are part of Defendant's Appendix and were submitted to the court well in advance of its charge. The court, however, failed to inform counsel of its proposed action with respect to these requests. In addition, the court did not give counsel an opportunity to make objections or specific requests outside the hearing of the jury (1534-1535). Furthermore, the instructions to the jury were defective and failed to properly appraise the jury of the essential elements as to each count in the indictment.

This Court in United States v. Fernandez, 456 F.2d 638, 644 (2nd Cir. 1972) stated with respect to Rule 30 "the rule is so plain, and its purpose so obvious, that we can perceive no justification for ignoring it." Although the defendant recognizes that no automatic reversal of the conviction would result from the failure to comply with Rule 30 (Hamling v. United States, 418 US 87 (1974)), it is clear from the record that the defendant was substantially prejudiced by its violation.

In determining from the entire record the extent to which the defendant was prejudiced, it is critical to compare the defendant's written requests and his summation with the Court's instructions to the jury. This analyses is appropriately performed by separately categorizing the 15 counts in the indictment.

A. False and Fraudulent Income Tax Returns (Counts 1 - 13)

The requests of the defendant which numbered one to nineteen dealt specifically with the counts in the indictment which charged him with willfully preparing false and fraudulent income tax returns. The Court failed to advise counsel before his summation of its proposed action with respect to these requests, although the requests included appropriate charges on circumstantial evidence (Request No. 2) and the definition of willfulness (Request Nos. 5, 6, 7, 9 and 11).

Defense counsel in his summation candidly conceded the fact that errors were made on certain tax returns but he strenuously argued that the proof was lacking with respect to the element of willfulness (1427-1429, 1457-1463). The primary defense was therefore directed to the absence of criminal intent, bad purpose or evil motive which is a required element to be proven by the Government United States v. Bishop, 412 U.S. 346, (1973). Despite the emphasis placed by the defense counsel on the absence of "willfulness" and the detailed requests to charge directed to this element, the Court only superficially dealt with it. In particular, the court's only general instruction on this element consisted of a one page statement to the jury (1493). This instruction, however, never mentioned the

critical elements required by the Bishop case namely; "bad purpose or evil motive" and which were contained in defendant's Request No. 6.

It would appear self-evident that the Court's duty to advise counsel of its proposed action before the summation is a more critical requirement of the rule than the duty to grant counsel an opportunity outside the hearing of the jury to object to the Court's instructions. The defense counsel in the instant matter was placed in the precarious position of speculating as to what the Court would instruct the jury. As such, the summation was subject to being disregarded by the jury, if the Court's instructions were inconsistent with it.

In view of the total disregard of Rule 30, this case is an appropriate one to be tested by the standard that, "...reversal will follow unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice a defendant's case," United States v. Schartner, 426 F.2d 470, 479-480 (3rd Cir. 1970); United States v. Fernandez, supra note, (5) page 644.*

It could hardly be argued that any error was eliminated by the Court allowing counsel to make oral requests

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* It is important to note that the Supreme Court holding in Hamling v. United States, supra p. 135 does not prohibit the application of the Schartner standard.

or objections in the presence of the jury after the instructions were given (1534). It is important to observe the manner in which the Court viewed the requests when it stated:

> "Now I have a large number of requests to charge from the Government and the defendant, and I think I have largely covered them, but I am prepared to rule on any specific one if you want to urge them now." (1534)

It is apparent that the judge treated the counsel's requests as an afterthought. Although some were read by the Court it was done in a very disjunctive fashion without being incorporated into the general charge. It was also made clear by the Court's treatment of them, that it did not view the requests as important or essential to the jury's deliberations. This fact was brought out when the jury returned for supplemental instructions on Counts 1 to 13 (1553). The Court again failed to comply with Rule 30 with respect to the supplemental instructions when it did not ask counsel for any requests. Furthermore, it simply repeated a portion of its general charge without any reference to the previously granted requests of counsel (1560).

The Court's failure to comply with Rule 30 and its failure to properly charge the jury on willfulness irreparably prejudiced the defendant and deprived him of a fair trial.

B. Destruction of Government Records (Count 14)

In defense counsel's summation, he dwelt on not only the issue dealing with whether the documents that were torn by the defendant were in fact government records that were previously filed (1435-1436) but he also emphasized the defense that Mr. Gill signed a note permitting the records to be removed (1336-1337). In addition, the defense raised the issue with respect to whether the defendant knew the documents that he tore up were government records or did he believe they were the records he brought with him that morning (1331-1332).

The defendant submitted written requests to the Court on this count which were numbered 20, 21 and 22. These written requests dovetailed with defense counsel's summation and raised the issues regarding not only whether the records were actually government records but also whether the defendant had knowledge of that fact; whether he acted with criminal intent as well as the claim that the records could be removed once Mr. Gill's application was withdrawn.

The Court's instructions to the jury on this count (1521-1524), only submitted to the jury the issue of whether or not the records were brought by the defendant the morning of January 18, or had been previously filed with the Small Business Administration. The Court did not advise the

defense counsel beforehand of his proposed instructions nor did he instruct the jury in conformity with defendant's request.

In addition, the Court's summary of the evidence on this count totally disregarded the defendant's corroborating evidence with respect to his copying the returns in question the morning of January 18. Furthermore, it never touched upon the defense relating to Mr. Gill's signing the statement which in effect withdrew his application.

The failure of the Court to advise counsel of his proposed action clearly mislead him with respect to framing the summation on this count and as such, it constituted reversible error. To hold otherwise, would have the effect of relegating Rule 30 to a recommended rule of courtroom etiquette.

C. Submission of False Loan Application (Count 15)

In the defendant's summation, he argued to the jury that although the document attached to the SBA loan application had not been filed with Internal Revenue, the defendant made no representations that it had been filed and in fact advised Mr. Goodwin of the SBA that it was an estimated return (1440-1443). It was also pointed out that Mr. Conlin ultimately filed the same document with the Internal Revenue Service as his 1971 return (1441). The defendant's

written request to charge on this count numbered 23, 24 and 25. These requests dealt with all of the essential elements required to convict on this count as well as the uncontroverted defense that Mr. Conlin advised the SBA that it was an estimated return.

The Court in its instructions to the jury gave a very superficial treatment to this count (1525-1527). The Court made no reference in its summary to the evidence of the defense on this count and in fact effectively charged the jury to return a verdict of guilty (1526). The only question submitted to the jury was a one sentence charge dealing with whether the defendant had criminal and evil intent when he filed the document (1527).

Not only did the Court prejudice the defendant in failing to appraise him of the charge to be given on this count, but the instruction that was given was erroneous and failed to set out the essential elements that were to be proven by the government. These elements would include proof that the loan application was false; the defendant knew the document was false and fraudulent in a material fact; and the defendant did the acts knowingly and willfully.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF SUBMITTING A FALSE LOAN APPLICATION

In count 15 of the indictment, the defendant was charged with willfully covering up by trick, scheme or device a material fact by submitting a loan application to the Small Business Administration with a copy of a 1971 federal income tax return when in fact the defendant had not yet filed his 1971 federal tax return.

In support of this count, the government presented the defendant's loan application (G-2) which contained a copy of a 1971 tax return that was unsigned. The government's proof also included the testimony of an employee from the Internal Revenue Service who advised that the defendant did not file his 1971 return until October 20, 1975 (400). In essence, the government's proof revealed that when the defendant filed his loan application on January 15, 1973, he had not yet filed the 1971 return which was attached to the application.

Mr. Conlin admitted that when he submitted his application to the SBA on the deadline date of January 15, 1973, he had not yet filed a '71 tax return although he had prepared an estimated copy which was attached to the application (1012-1013). In addition, Conlin testified that the

computations on the copy were accurate. In fact, there was no proof presented by the government to rebut their accuracy. Furthermore, the defendant testified that he advised Mr. Goodwin of the SBA when he filed the loan application, that he had attached an estimated return (1012-1013). The government again failed to rebut the testimony of the defendant with respect to his statements to Mr. Goodwin of the SBA.

There was nothing in the loan application swearing to the fact that the return which was attached to it was actually a copy of a return that had been filed by the applicant. In addition, an official of the SBA testified that his office did accept estimated returns (81).

It is quite evident that the claims of the Government with respect to the tax return were specious since there was no proof that anything contained on the return or the application was in fact false. Furthermore, the return in question was not signed by the defendant and although he didn't state on the return that it was estimated, there is nothing in the application to indicate that such a statement was appropriate.

The Government clearly failed to prove any inaccuracy on the tax return and, in addition, it failed to rebut the defendant's testimony with respect to his statements to Mr. Goodwin of the SBA. The submission of this

count to the jury was clearly in error. There was simply no evidence to substantiate the claim that the defendant willfully deceived or covered-up a material fact with respect to any information contained in the application. The conviction on this count should, therefore, be reversed.

POINT VI

IN VIEW OF THE NUMEROUS ERRORS THAT OCCURRED BEFORE AND DURING THE TRIAL, THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL AND THE CONVICTIONS SHOULD BE REVERSED.

In addition to the above errors that occurred during the trial, there were other instances where the trial court abused its discretion and deprived the defendant of a fair trial.

A. The trial court improperly denied the defendant's motion for discovery and inspection.

In defendant's motion for discovery and inspection, which was argued before the court on January 13, 1975, he sought various materials which he was entitled to pursuant to Rule 16 of Federal Rules of Criminal Procedure. The only contested portion of defendant's motion dealt with the requests contained in paragraphs 2, 3 and 4. In essence, these requests dealt with records, papers, and documents of the Government which Government was intending to rely upon to prove the allegations contained in the indictment with

respect to the false deductions. It also sought the records the Government intended to use to establish the correct amounts. In the government's response to defendant's motion, it simply claimed that the records were evidentiary and need not be disclosed by the Government.

In view of the complicated and detailed type of proof presented with respect to the various deductions claimed to be inaccurate, it was most appropriate that the Government disclose the various materials it intended to use to prove the false deductions. The Court, however, in its decision dated June 11, 1975 summarily denied the defendant's request without enumerating any reason for its decision.

In view of the nature of the trial and the essential need of the defense to prepare, it was an abuse of the Court's discretion to deny defendant's motion.

B. The Court failed to take any precautionary measures to isolate the jury from the newspaper publicity surrounding the trial.

In view of the attendant publicity concerning the trial of this matter, defense counsel on the second day of the trial requested a direction from the Court that the jury not consider any of the newspaper reports dealing with the trial. He also specifically requested that the Court direct

the jurors not to read newspaper articles or listen to radio reports dealing with the trial (271).* The Court refused to direct the jurors not to read the newspaper articles although he did advise the jury that the articles were not evidence in the case (271-272). In the Court's final instruction to the jury, it acknowledged the "substantial amount of newspaper publicity and media publicity" (1532) and yet it failed to take the simple precaution requested by defense counsel.

It is evident that the trial court took virtually no step to insure that the jurors were not exposed to such publicity and that was his clear responsibility. See United States v. Catalano, 491 F. 2nd 268, 276 (2nd Cir. 1974) and United States v. Agueci, 310 F. 2nd 817, 832 (2nd Cir. 1962).

C. The Court abused its discretion and committed error in allowing the admission into evidence of government exhibit 79.

During the cross-examination of the defendant, the government attorney directed the defendant's attention to exhibit G-79(1120) to which the defendant responded that he had never seen it before. The document which was admitted

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* This type of instruction has been previously approved, United States v. Solomon, 422 F. 2d 1110 (7th Cir. 1970) cert. denied, 399 U.S. 911; U.S. v. Polizzi, 500 F. 2d 856, (9th Cir. 1974) cert. denied 419 U.S. 1120.

in evidence (1128) over the defendant's objection was clearly immaterial and no foundation was laid for its offer.

The exhibit was an internal memorandum of IRS and it dealt with the financial condition of Mr. Conlin. It was prepared in May, 1969 in connection with a tax assessment.

The document was used by the government to cross-examine the defendant and it was again referred to in the government's summation (1367-1368).

There was simply no basis for the introduction of that exhibit, which was irrelevant and in clear violation of the hearsay rule (Rules 801-805 of the Federal Rules of Evidence). It also appears that the Court didn't even review the exhibit before overruling the defendant's objection to it. It was clearly an error to admit it and its prejudicial effect upon the defendant deprived him of a fair trial.

D. The defendant was denied a speedy trial and was prejudiced by the inordinate delay that occurred subsequent to his arrest.

The defendant was arrested on January 18, 1974 and charged with destroying government records in violation of Title 18, United States Code, § 2071(a). It was not until October 10, 1974 that the defendant was indicted for this charge (Count 14), and the government initially moved the case for trial on May 12, 1975. As a result, there was a

delay of nine months between the date of the arrest and indictment and a further delay of seven months before the government was ready for trial. These delays prejudiced the defendant, deprived him of a speedy trial and were in violation of Rule 5 of the Federal Rules of Criminal Procedure and Rule 4 of the Western District's Plan for the prompt disposition of criminal cases.

It is apparent that the delay that occurred between the arrest and indictment was used by the government in an attempt to marshal additional charges against the defendant relating to the preparation of tax returns. (See exhibit G-82.)

Although it is conceded by the defendant that he did not move to dismiss the charges or press for an early trial date, there was no waiver of the inordinate delay that occurred between the date of the arrest and when the government was ready for trial. At the minimum, Count 14 of the indictment should be dismissed with prejudice.

CONCLUSION

For the reasons above stated, it is respectfully requested that the judgment of conviction be vacated and the

indictment dismissed or, in the alternative, a new trial be granted the defendant.

Dated: Rochester, New York
November 24, 1976

Respectfully submitted,

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